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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/763,673

01/22/2004

Frederic Perriot

20423-08166

7489

34415

7590

02/13/2008

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EXAMINER

MORAN, RANDAL D

ART UNIT

PAPER NUMBER

2135

NOTIFICATION DATE

DELIVERY MODE

02/13/2008

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ptoc@fenwick.com  
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<b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b>	Application No. 10/763,673	Applicant(s) PERRIOT, FREDERIC	
	Examiner Randal D. Moran	Art Unit 2135	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 22 January 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
- NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL -324).

5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 1-19 and 24-26.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s).

13. ☐ Other: \_\_\_\_\_.



/RDM/

**THANHNGA TRUONG**  
**PRIMARY EXAMINER**

Continuation of 11. does NOT place the application in condition for allowance because: Regarding Claims 1 and 24, applicants arguments have been fully considered but are not persuasive. With respect to applicants arguments that the combination of Yamamoto and Nachenberg fails to teach "optimizing the identified code, the examiner disagrees and directs the applicant to Yamamoto - column 5- lines 26-38 and Nachenberg- abstract. Nachenberg discloses "a polymorphic Anti-virus module comprises a CPU emulator (210) for emulating the target program, a virus signature scanning module" (i.e. a module for identifying computer code suspected of currently containing malicious code). Once this code is identified as potentially containing malicious code. The code optimizing functionality of Yamamoto is used. Yamamoto discloses "the code optimizing portion 38 receives the intermediate code of the intermediate file 36 obtained in the intermediate code generating portion 34 .... The local optimization is a method of decreasing excess commands, while the loop optimization is a method of unconditionally expelling from the loop, an expression that shows the value whenever the loop is executed." (i.e. optimizing the identified computer code). The code that is being optimized by the teachings of Yamamoto is code that has been previously identified as possibly containing malicious code by the virus scanning module of Nachenberg. Therefore, the combination of Yamamoto and Nachenberg teaches "optimizing the identified computer code" as recited in Claim 1.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Regarding Claims 5 and 6, applicants arguments have been fully considered but are not persuasive. With respect to applicants arguments the the combination of Yamamoto and Nachenberg fails to teach " optimizing the decryption loop to produce optimized loop code" and "optimizing the body to produce optimized body code". Examiner disagrees and directs the applicant to Nachenberg- column 6- lines 54-67 and column 7- lines 1-8. Nachenberg discloses "a static exclusion module 230 and a dynamic exclusion module 240, which combine to substantially reduce the number of file instructions" (i.e. optimize the code). The substantial reduction in the number of file instructions as taught by Nachenberg could reasonably be interpreted to be "code optimization" as recited in the claim.

Regarding Claim 27, applicants arguments have been fully considered but are not persuasive. With respect to applicants arguments that the combination of Yamamoto and Lovett fails to teach "the amount of dead code eliminated during the dead code elimination procedure exceeds a preselected dead code threshold". Examiner disagrees and directs the applicant to Lovett- [0133], [0144], [0091] lines 1-2, [0098] lines 9-27, [0107]. Lovett discloses "group block construction is triggered when the current block's profiling metric reaches a trigger threshold". Lovett further discloses "the global dead code transformations can be recorded as list of "dead" subject registers". It would have been obvious to one of ordinary skill in the art to use the "dead code transformations list" (i.e. the amount of dead code eliminated during the dead code elimination procedure) to actuate a trigger threshold and declare a suspicion that the code contains a virus. The suspicion being disclosed by Yamamoto- column 6- lines 31-37. Yamamoto discloses when the object program is interrupted, a message that the process has been interrupted due to a virus infection, is of course, outputted to an operator console or the like.

/RDM/